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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/559,504

05/22/2006

Hans Zoerb

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3827

46395 7590 03/10/2010

CARGILL, INCORPORATED  
P.O. Box 5624  
MINNEAPOLIS, MN 55440-5624

EXAMINER

SMITH, PRESTON

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

03/10/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<p><b>Application No.</b> 10/559,504</p>	<p><b>Applicant(s)</b> ZOERB, HANS</p>	
	<p><b>Examiner</b> PRESTON SMITH</p>	<p><b>Art Unit</b> 1794</p>	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 16 February 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 1,2,4-6,9-11,14-16 and 19-29.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☒ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). 1/20/2010  
13. ☒ Other: The information disclosure statement filed 01/20/2010 fails to comply with 37 CFR 1.97(c) because it lacks a statement as specified in 37 CFR 1.97(e) and fails to comply with 37 CFR 1.97(d) because it lacks the fee set forth in 37 CFR 1.17(p). Additionally, the information disclosure statement filed fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because applicant has not signed the information disclosure statement. It has been placed in the application file, but the information referred to therein has not been considered.

/Drew E Becker/  
Primary Examiner, Art Unit 1794

U.S. Patent and Trademark Office  
PTOL-303 (Rev. 08-06)

**Advisory Action Before the Filing of an Appeal Brief**

Part of Paper No. 20100303

Continuation of 3. NOTE: The newly added claim limitation, "wherein the native whey protein or native casein protein is substantially undamaged with the mixture is rehydrated" would require further search and/or considerations. .

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments filed 2/16/2010 have been fully considered but they are not persuasive.

Applicant argues that one of ordinary skill would not be motivated to substitute the soy peptide of Mandai with the whey protein isolate of Liebrecht because Liebrecht teaches away since the resulting beverage would have unappealing sediment and not be clear in absence of natural milk mineral concentrate or calcium lactate gluconate (see page 8). The composite invention of Mandai in view of Liebrecht would simply be the product of Mandai containing whey protein isolate instead of soy peptide. The product of Mandai is not limited to clear beverages and the combination of references does not appear to suggest that the resulting beverage would have an unappealing sediment. One of ordinary skill in the art at the time of the invention would have been motivated to substitute whey protein for soy peptide in order to produce a beverage that is very high in biological value (see whey protein vs soy protein NPL). This beverage would be appealing to an athlete and thus would enhance the value of the invention taught by Mandai.

Additionally, applicant argues that Liebrecht does not teach the denaturing of the proteins (see page 8). Mandai was used to teach this. One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicant also argues on page 9 that it would not have been obvious to add trehalose to protein in an amount to mask flavor since the mechanism for adding trehalose to mask protein is different from adding trehalose to mask peptides. Mandai teaches that trehalose has a favorable taste masking effect and taste improving effect (column 11, line 41-42). The goal of Mandai is to add trehalose to improve the taste of the beverage so simply because the amounts of trehalose needed may differ due to using protein instead of peptide does not appear to be non obvious. If protein is used instead of peptide, one of ordinary skill would have known to adjust the amounts of trehalose added in order to produce the same or substantially the same masking effect. Incrementally adding trehalose and tasting small samples of the beverage in increments could be done to obtain a favorable tasting product.